No. 88-1383

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

BRUCE ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner made a knowing and intelligent waiver of his right to a lawyer free of potential conflicts of interest.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 860 F.2d 1382.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1988. A petition for rehearing was denied on December 6, 1988. Pet. App. 17-19. The petition for a writ of certiorari was filed on February 9, 1989, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was con-

victed of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c), and conspiring to commit that offense, in violation of 18 U.S.C. 1962(d). He was also convicted on two counts of interfering with interstate commerce by threats and violence, in violation of 18 U.S.C. 1951. He was sentenced to 10 years' imprisonment.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner—a former state prosecutor and a member of the bar for more than 20 years—routinely bribed various Chicago city court judges. In Illinois, criminal defendants post with the court 10% of any appearance bond. If the defendant appears for trial, that money is refunded, minus a fee. The court, however, can direct that the refund be paid to the defendant's lawyer to cover legal fees. Petitioner had an arrangement with Judge Wayne Olson in which petitioner kicked back a portion of any cash bond refund that was assigned to him by the judge. In addition, petitioner paid bribes to Judge Olson in order to influence the outcome of cases. Pet. App. 2-4.

Petitioner also served as a broker between Judge Alan Lane and criminal defense lawyers who were willing to pay bribes for favorable rulings for their clients. In one case, Rocco Filliponio was acquitted by the judge on serious drug and weapons charges in exchange for $15,000. Petitioner was paid an additional $10,000 for setting up the deal. In another case, petitioner approached Michael Davis following Davis's conviction and promised him that he would prevail in his post-trial motions if he paid $10,000, to be split equally between Judge Lane and petitioner. On another occasion, petitioner helped a defendant to bribe another judge in order to obtain a favorable post-trial ruling. Pet. App. 4-6.

Petitioner was arrested by federal law enforcement agents during the "Greylord" investigation into corruption in the Chicago criminal justice system. He retained Patrick Tuite, one of Chicago's leading criminal defense lawyers, to represent him at trial. Tuite had represented several judges and lawyers in connection with charges of corruption and had engineered the only total acquittal that had been obtained in any Greylord prosecution. Tuite informed petitioner that he could not represent petitioner in connection with a plea bargain, but that he would represent him if petitioner pleaded not guilty and went to trial. Petitioner agreed to that condition and retained Tuite. Pet. App. 6.

The district court conducted a hearing to determine whether petitioner understood and wished to waive potential conflicts of interest created by Tuite's representation of other Greylord defendants. Pet. App. 23-29. At the hearing, the prosecutor expressed concern that in state court Tuite had represented co-defendants of both Filliponio and Davis, who were to testify for the government. Tuite told the court that his prior representation would not prevent him from conducting a thorough cross-examination of Filliponio and Davis. Pet. App. 6-7, 26-27.

Petitioner informed the court that he had "fully discussed everything with Mr. Tuite at some length," that he was "well aware of all of the potential conflicts," that he did "not believe there are any conflicts," and that he would "waive any potential conflicts." Pet. App. 27. Petitioner added that he wanted Tuite "to continue to represent me in the case." *Ibid.* The court asked Tuite about the effect of his representation of other Greylord defendants and suspects. Tuite said: "I'm not exactly sure all of the things that would come up. But I represent so many people in these investigations, there's always potential conflict." Pet. App. 28. Petitioner stated that he understood his

right of conflict-free representation and again stood on his choice of attorney. The court then asked petitioner whether he understood that Tuite could not represent petitioner if he decided to negotiate a plea with the government. Petitioner stated that he was "fully aware of that." Pet. App. 29.

2. Following his conviction, petitioner moved for a new trial based on Tuite's alleged conflict of interest. Petitioner claimed that Tuite had every reason to be cautious in representing him because Tuite was under investigation by the state attorney disciplinary commission for having loaned money to a Greylord judge in 1982. He also claimed that after petitioner's conviction, Tuite ceased to represent him on appeal or at an appearance before a federal grand jury because of the conflict. Petitioner further claimed that he was prejudiced because Tuite did not call him to testify in his own behalf. Tuite took that position, petitioner claimed, because Tuite wanted either to avoid incurring the prosecutor's enmity or to avoid eliciting from petitioner evidence that could damage Tuite's other clients. Pet. App. 44-48.

Petitioner's motion was assigned to a different judge, because the judge who presided over petitioner's trial had resigned in the interim. The district court denied the motion without a hearing. The court noted that Tuite's difficulties with the disciplinary committee did not constitute grounds from which to infer a conflict of interest. The court also rejected petitioner's claim that the conflict caused Tuite not to call petitioner as a witness. The court concluded that petitioner made a knowing, intelligent, and voluntary waiver of his right not to testify following an inquiry by the trial judge. Pet. App. 35.

The court of appeals affirmed (Pet. App. 1-6), holding that petitioner validly waived his right to conflict-free counsel. The court stated that a waiver is sufficient if the defendant knows enough about the risks of conflicts of in-

terest to make his choice an informed one. The court of appeals noted that a trial court should inform a defendant of the nature and the importance of the right to conflict-free counsel and ensure that the defendant understands that right and something of the consequences of a conflict. It stated that a valid waiver would result if the "defendant knows the types of risks at stake and acts 'with open eyes.' " Pet. App. 12.

In upholding petitioner's waiver, the court noted that petitioner had been a lawyer for more than 20 years and knew what conflicts of interest are and their consequences; that petitioner had hired Tuite precisely because of Tuite's experience in defending Greylord defendants; and that Tuite had stated in court that he would not do anything to jeopardize his other clients. Under these circumstances, the court concluded, petitioner's waiver was both knowing and voluntary. Pet. App. 13.

The court of appeals further concluded that, even if petitioner's waiver did not encompass undisclosed, potential conflicts, petitioner had failed to establish, by specific instances in the record, that Tuite was burdened with an actual conflict of interest that adversely affected his ability to defend petitioner zealously. "Even if [petitioner's] decision not to testify was based on Tuite's advice, which is unlikely," the court noted, "there is no evidence beyond [petitioner's] conjecture that the advice was the product of an actual conflict rather than the product of a prudent defense strategy." Pet. App. 14.

ARGUMENT

Petitioner contends (Pet. 4-9) that he did not execute a valid waiver of conflict-free counsel because the district court did not conduct a thorough inquiry into his attorney's possible conflicts of interest. The court of ap-

peals correctly rejected this fact-bound claim, and its decision does not conflict with the decisions of this Court or any other court of appeals.

1. The Sixth Amendment right to counsel includes the right to an attorney who is not laboring under a conflict of interest. See *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). A defendant, however, may waive that right. See *Holloway* v. *Arkansas*, 435 U.S. 475, 483 n.5 (1978). See generally *Wheat* v. *United States*, 108 S.Ct. 1692, 1696-1700 (1988). When a defendant wishes to waive his right to conflict-free counsel, the trial court should conduct a hearing to determine that the defendant's waiver is knowing and intelligent. But the trial court is not required to follow any predetermined script in conducting the hearing, nor is the court required to ascertain that the defendant is aware of every piece of information that could possibly bear on the issue. "[A] defendant need not be aware of every detail of a conflict of interest to be able effectively to waive the right." *In re Paradyne Corp.*, 803 F.2d 604, 611 (11th Cir. 1986). See also *Moran* v. *Burbine*, 475 U.S. 412, 422 (1986) (waiver of the right to counsel does not depend on knowledge of every factor that could conceivably influence decision). Rather, it is sufficient that the defendant "understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict." *United States* v. *Garcia*, 517 F.2d 272, 278 (5th Cir. 1975).

Petitioner's waiver was plainly valid. During the conflict hearing, petitioner specifically informed the district court that he had "fully discussed everything" with Tuite, that he was "well aware of all of the potential conflicts," and that he nevertheless desired to retain Tuite as his attorney. The district court had ample reason to credit petitioner's response. As an attorney who had practiced criminal law for 20 years, petitioner undoubtedly understood his Sixth Amendment right to counsel and the consequences of pro-

ceeding with an attorney burdened with a conflict of interest. Moreover, petitioner clearly knew many of the details of his attorney's potential conflicts since his selection of his attorney was expressly based on the attorney's previous experience in representing Greylord defendants. And the court specifically addressed two prior state cases in which Tuite had been involved, which the prosecutor suggested might give rise to a conflict. Pet. App. 24-25. Tuite and petitioner both expressed their awareness of those incidents. Tuite described them in detail and explained why he did not believe they would create a conflict of interest and, upon inquiry by the court, petitioner agreed. *Id.* at 26-27. In sum, given petitioner's experience and his unequivocal assurances that he understood his rights but wished to retain Tuite, the court of appeals properly held that petitioner knowingly and intelligently waived his right to conflict-free counsel.

2. Contrary to petitioner's contention (Pet. 7-9), the decision below does not conflict with *Wheat* v. *United States, supra.* In *Wheat*, this Court held that a district court has considerable discretion to refuse to accept a defendant's waiver of conflict-free counsel in the interest of justice. That case did not involve the validity of the waiver, but involved the quite different question whether a district court is required to accept a waiver if the defendant offers it. Thus, even if the district court, under *Wheat*, could have refused to accept petitioner's waiver, that does not by any means indicate that the court's decision to accept the waiver was error.

Nor does the decision below conflict with any court of appeals' decision. In *United States* v. *Garcia, supra,* the Fifth Circuit stated that a trial court must conduct a "thorough consultation" with the defendant before accepting the defendant's waiver of conflict-free counsel, but it did not require the court to conduct a prescripted inquiry

divorced from the facts of the case, nor did it require the court to examine the defendant concerning every possible fact that could bear on the issue of waiver. See *In re Paradyne Corp.*, 803 F.2d at 611 n.18. As the Fifth and Eleventh Circuits require, the district judge in this case addressed petitioner personally, forthrightly advised him of the potential for a conflict of interest, and elicited a "narrative response" from petitioner that he had been advised of his right to effective representation and that he understood the potential conflicts. *Garcia*, 517 F.2d at 278; *In re Paradyne Corp.*, 803 F.2d at 608.

In *United States* v. *Petz*, 764 F.2d 1390 (11th Cir. 1985), upon which petitioner also relies (Pet. 6), the court of appeals declined to resolve the issue whether the defendant had waived his right to conflict-free counsel. The court held merely that the defendant could raise the matter in a collateral proceeding. None of the other cases cited by petitioner (Pet. 5-6) involved the issue of the sufficiency of the district court's inquiry of the defendant before accepting a waiver of conflict-free counsel.*

3. Petitioner does not challenge the court of appeals' conclusion (Pet. App. 13) that petitioner failed to demonstrate that his attorney had an actual conflict of interest

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* In *United States* v. *Flanagan*, 679 F.2d 1072 (3d Cir. 1982), rev'd on other grounds, 465 U.S. 259 (1984), and *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978), the court of appeals upheld the district court's disqualification of an attorney on the ground that the attorney had a conflict of interest. In *United States* v. *Dressel*, 742 F.2d 1256 (10th Cir. 1984), the court of appeals held that the defendant was not denied the effective assistance of counsel where the attorney had represented a co-defendant and had previously represented a government witness. Finally, in *United States* v. *Diozzi*, 807 F.2d 10 (1st Cir. 1986), the court of appeals held only that the trial court erred in disqualifying the defendant's attorney on the ground of conflict of interest.

that adversely affected his representation of petitioner. Thus, even assuming that petitioner's waiver was not sufficient to encompass undisclosed, potential conflicts, petitioner has failed to establish any basis for disturbing his conviction. See *Burger* v. *Kemp*, 107 S.Ct. 3114, 3121 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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